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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 Q. DIAZ GATES NGUYEN, aka  
12 NOEL GALLEG0 GARRUCHA,  
13 CDCR #T-94012;  
INMATE BOOKING NO. 7775738,

14 Plaintiff,

15 vs.  
16

17 S.J. CARROLL,

18  
19 Defendant.  
20

Civil No. 08-0235 BTM (POR)

**ORDER DENYING MOTION TO  
PROCEED *IN FORMA PAUPERIS*  
AS BARRED BY 28 U.S.C. § 1915(g)  
[Doc. No. 23]**

**AND**

**DISMISSING CIVIL ACTION  
WITHOUT PREJUDICE FOR  
FAILURE TO PAY CIVIL FILING  
FEES MANDATED BY  
28 U.S.C. § 1914(a)**

21  
22 Plaintiff, an inmate currently housed at the George Bailey Detention Facility in San  
23 Diego, California and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C.  
24 § 1983.

25 Plaintiff has not prepaid the \$350 civil filing fee required by 28 U.S.C. § 1914(a); instead  
26 he has submitted a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C.  
27 § 1915(a) [Doc. No. 3].

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**I. Motion to Proceed IFP**

Section 1915 of Title 28 of the United States Code allows certain litigants to pursue civil litigation IFP, that is, without the full prepayment of fees or costs. 28 U.S.C. § 1915(a)(2). However, the Prison Litigation Reform Act (“PLRA”) amended section 1915 to preclude the privilege to proceed IFP:

. . . if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief can be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’ provision.” *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (hereafter “*Andrews*”). “Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed IFP.” *Id.*; see also *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter “*Andrews v. Cervantes*”) (Under the PLRA, “[p]risoners who have repeatedly brought unsuccessful suits may entirely be barred from IFP status under the three strikes rule[.]”). The objective of the PLRA is to further “the congressional goal of reducing frivolous prisoner litigation in federal court.” *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997).

“‘Strikes’ are prior cases or appeals, brought while the plaintiff was a prisoner, which were dismissed ‘on the ground that [they were] frivolous, malicious, or fail[ed] to state a claim.’” *Andrews*, 398 F.3d at 1116 n.1. Thus, once a prisoner has accumulated three strikes, he is prohibited by section 1915(g) from pursuing any other action IFP in federal court unless he is under “imminent danger of serious physical injury.” 28 U.S.C. § 1915(g); *Andrews v. Cervantes*, 493 F.3d at 1051-52 (noting § 1915(g)’s exception for IFP complaints which “make[] a plausible allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the time of filing.”).

While the PLRA does not require a prisoner to declare that § 1915(g) does not bar his request to proceed IFP, *Andrews*, 398 F.3d at 1119, “[i]n some instances, the district court docket records may be sufficient to show that a prior dismissal satisfies at least one of the criteria

1 under § 1915(g) and therefore counts as a strike.” *Id.* at 1120. When applying 28 U.S.C.  
 2 § 1915(g), however, the court must “conduct a careful evaluation of the order dismissing an  
 3 action, and other relevant information,” before determining that the action “was dismissed  
 4 because it was frivolous, malicious or failed to state a claim,” since “not all unsuccessful cases  
 5 qualify as a strike under § 1915(g).” *Id.* at 1121.

6 The Ninth Circuit has held that “the phrase ‘fails to state a claim on which relief may be  
 7 granted,’ as used elsewhere in § 1915, ‘parallels the language of Federal Rule of Civil Procedure  
 8 12(b)(6).’” *Id.* at 1121 (quoting *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)).  
 9 *Andrews* further holds that a case is “frivolous” for purposes of § 1915(g) “if it is of little weight  
 10 or importance” or “ha[s] no basis in law or fact.” 398 F.3d at 1121 (citations omitted); *see also*  
 11 *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (“[A] complaint, containing as it does both factual  
 12 allegations and legal conclusions, is frivolous [under 28 U.S.C. § 1915] where it lacks an  
 13 arguable basis in either law or in fact .... [The] term ‘frivolous,’ when applied to a complaint,  
 14 embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.”). “A  
 15 case is malicious if it was filed with the intention or desire to harm another.” *Andrews*, 398 F.3d  
 16 at 1121 (quotation and citation omitted).

## 17 **II. Application of 28 U.S.C. § 1915(g)**

18 The Court notes as an initial matter that it has carefully reviewed the Complaint and has  
 19 ascertained that it makes no “plausible allegation” to suggest Plaintiff “faced ‘imminent danger  
 20 of serious physical injury’ at the time of filing.” *Andrews v. Cervantes*, 493 F.3d at 1055  
 21 (quoting 28 U.S.C. § 1915(g)). Therefore, Plaintiff may be barred from proceeding IFP in this  
 22 action if he has on three prior occasions had civil actions or appeals dismissed as frivolous,  
 23 malicious or for failing to state a claim. *See* 28 U.S.C. § 1915(g).

24 A court “may take notice of proceedings in other courts, both within and without the  
 25 federal judicial system, if those proceedings have a direct relation to matters at issue.” *United*  
 26 *States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.  
 27 1992); *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979). Here, the  
 28 Court takes judicial notice that Plaintiff has had three prior prisoner civil actions dismissed on

the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A. *See Nguyen v. Yost, et al.*, Civil Case No. 07-2096 L (CAB) (S.D. Cal. Nov. 6, 2007) (Order dismissing complaint as frivolous pursuant to 28 U.S.C. § 1915A) (strike one); *Nguyen v. Ferguson, et al.*, Civil Case No. 07-1906 JAH (POR) (S.D. Cal. Dec. 21, 2007) (Order dismissing complaint as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B) & § 1915A(b)(1)) (strike two); *Nguyen v. San Diego County Jail, et al.*, Civil Case No. 07-1907 LAB (NLS) (Order dismissing complaint as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B) & § 1915A(b)(1)) (strike three).

Accordingly, because Plaintiff has, while incarcerated, accumulated three “strikes” pursuant to § 1915(g), and fails to make a “plausible allegation” that he is under imminent danger of serious physical injury, he is not entitled to the privilege of proceeding IFP in this action. *See Andrews v. Cervantes*, 493 F.3d at 1055; *Rodriguez*, 169 F.3d at 1180 (finding that 28 U.S.C. § 1915(g) “does not prevent all prisoners from accessing the courts; it only precludes prisoners with a history of abusing the legal system from continuing to abuse it while enjoying IFP status”); *see also Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (“[C]ourt permission to proceed IFP is itself a matter of privilege and not right.”).

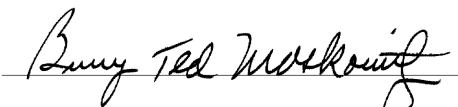
### III. Conclusion and Order

For the reasons set forth above, the Court hereby **DENIES** Plaintiff’s Motion to Proceed *In Forma Pauperis* as barred by 28 U.S.C. § 1915(g) [Doc. No. 3], and **DISMISSES** this action without prejudice pursuant to 28 U.S.C. § 1914(a) for failing to prepay the \$350 filing fee.

The Clerk shall close the file.

**IT IS SO ORDERED.**

DATED: February 20, 2008

  
Honorable Barry Ted Moskowitz  
United States District Judge